Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 77-1668

JOAN TAYLOR,

Petitioner,

vs.

RAYMOND PERGEAU, D.D.S.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Joan Taylor, as
propria persona
124 South Rossmore
Los Angeles, CA 90004

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The above-named petitioner respectfully prays that a writ of certiorari issue to review the order decision of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on February 23, 1978.

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OPINION BELOW

The opinion of the Court of Appeals is not reported, and will not be. The order to dismiss the appeal is attached hereto as EXHIBIT "A."



JURISDICTION

The order of the Court of Appeals for the Ninth Circuit was entered October 26, 1977 granting dentist-appellee motion to dismiss frivolous claim, with treble money damages from facially-paralyzed victim. A second timely petition for rehearing was denied on February 23, 1978. A timely petition for rehearing was denied on December 16, 1977. Petition for certiorari was filed within 90 days of the second petition. This Court's jurisdiction is invoked under # 28 U.S.C.A. 1332(c), United States Constitutional Ammendment 7, and the federal rules of civil procedure Rules 56(c,e,f) and 60(b), under # 28 U.S.C.A.

The order decision of October 26, 1977 in Case No. 77-1891 affirmed summary judgment by law for defendant dentist by default of plaintiff in Phoenix District Court of Arizona, Honorable Walter H. Craig, Judge, in Case No. 76-93 when this Circuit Court of Appeals denied appellant-plaintiff second petition for rehearing on dentist's motion to dismiss appeal. This statement is submitted to show that the Supreme Court of the United States has jurisdiction, a substantial question of citizen individual right to jury trial in dental claim of national precedent in care standards for the occlusion.

The complaint for relief was brought by plaintiff (petitioner herein), victim facially paralyzed by dentist (respondent) Raymond Pergeau, D.D.S., Phoenix, Arizona, as a counterclaim to dentist suit for partial bill in 1974. Complaint was filed February 6, 1976; answered March 3, 1976. Plaintiff answered interrogatories April 1976. On May 23, 1976, dentist was granted summary judgment by law, in default of plaintiff

who did not receive motion, by defective service of mail, after residence move by woman. On June 17, 1976, woman informed court of defective mail service; and lawyer for her informed the court.

In time of default, woman was maimed by constant crime linked to dental suits, by investigators who informed courts, and a lawyer-investigator. The woman was beset by savage crime unchecked by police and federal authorities from mid-1975 until partial protection in 1978, and sporadic protection after mid-1977. When police refused to stop assaults and batteries of radiation and crime by electronic means, woman spent $20,000 on lawyers and paid investigators to stop the crime which has left her maimed. Physician-internist wrote the court of radiation toxicities for her, thyroid, scalp, and bone injury by it. A dentist-attorney wrote her dental claim merit for court. After federal and all law enforcements refused her aid, the Los Angeles district attorney letter informed her police should act, and, after mid-1977, sporadic police protection was given her.

On December 20, 1976, woman's motion to vacate summary judgment by her default was denied. On February 7, 1977, her amended motion to vacate summary judgment was denied, despite Arizona lawyer plea for her and her affidavit December 29, 1976 to state dental injury first known to her FEBRUARY 8, 1974. fourteen teeth crowns placed six days before fell out, breaking part of tooth root and disclosing heavy weight. Affidavit established suit timely filed February 6, 1976, within two years' time of Arizona Statute of tort limitations, A.R.S. 12-542. Complaint had no defect on its face. Affidavit stopped binding force of law clerk's 1974 pleading TO STATE, AS 70-HOUR ERROR: "SHE MAY HAVE KNOWN HARM FEBRUARY 4, 1974 WHEN SHE STOPPED HER CHECK TO DENTIST..." in pleading EXHIBIT "B" (paraphrased.)



error in fact, allegation required by law as meritorious defense, in notice pleading of 70-hour time variance-error, when both federal and Arizona civil procedural practice is to sustain suit, and allow all weighing of evidence for jury trial on merits.

On this February 7, 1977 hearing to have summary judgment by default vacated by motion, respected Arizona lawyer Peter Guerro told the court ample authority existed to rule for plaintiff, and set aside judgment by default. The judge denied plaintiff motion to vacate and did not let her testify. No question of credibility existed.

Woman filed timely appeal to Ninth Circuit in 28 days. Dentist filed motion to dismiss appeal April 21, 1977. It was denied. Appellant, in her motions to extend time for brief, sent two letters from her doctor to inform of radiation toxicities and year-long treatment by this; dentist's letter to inform her dental claim merit; and investigators' reports, affidavit, to inform of crime for her, from 1975 through 1977. The Ninth Circuit granted only one motion to extend time for brief by illness,

Dentist-appellee re-submitted motion to dismiss August 1, 1977, asking the Ninth Circuit to examine jurisdiction. despite unproven allegation as defense required by law and firm affidavit words of plaintiff to state she discovered harm February 8, 1974; and thus suit timely filed February 6, 1976. Woman-appellant answered, citing Wigmore and Arizona suit, but the Circuit Court granted dentist motion to dismiss October 26, 1977. The appellant's petition for rehearing was timely, denied December 16, 1977. A second petition denied February 28,1978.

## QUESTIONS PRESENTED

1. Is it function of the Court of Appeals, when examining jurisdiction, as appellee asks in motion to dismiss for frivolous appeal, to weigh evidence, speculate upon inferences and ultimate facts when clear factual conflict of mind state of appellant woman exists by 1976 affidavit to dispel binding force of prior 1974 pleading allegation, inconclusive and unproven, not-litigated by law clerk notice pleading?

2. Is it function of the Court of Appeals, when examining jurisdiction, as appellee asks in motion to dismiss, to apply both federal civil procedural rules and Arizona's usual holding, to allow any prior, unproven allegation, never used or essential in judgmen+ to lose binding force when contradicted by the party? Did the district court have the same function, in a factual dispute in a summary judgment proceeding?

3. Did the District judge weigh the evidence, infer and speculate upon ultimate facts when a clear factual issue of appellant-plaintiff woman mind state contradicted prior inconclusive, unproven allegation as law clerk defense?

4. Was it function of the Court of Appeals, in allow dentist-appellee motion to dismiss appeal in examining for jurisdiction, to find no defect on face of complaint, and default to summary judgment fulfilling federal requirements of federal rule of civil procedure 60(b) and clear, factual issue to preclude a retention of of summary judgment?

4.5 Was it function of the Appeals Court, to remand to district, to allow default of plaintiff lifted, and allow record to develop facts of case? with evidence of lawyer's 1974 pleading error of fact?



5. As Arizona allows contradiction by party to dispel binding force of prior lawyer pleading inconclusive, unproven allegation of no prior judgment function, did the Court of Appeals fail to apply Arizona and federal evidentiary criteria, to determine jurisdiction existed, as credibility of appellant was not in question?

6. Did both district and appellate courts fail to apply the rudiments of federal rules of civil procedure 56(c) to recognize jurisdiction existed and a factual issue of the discovery of dental injury would be determined by the jury and trier of fact, with the inconclusive 1974 law clerk pleading allegation as defense required by law merely evidentiary in the instant suit?

7. As Arizona demands estoppel to require reliance and injury to adverse party, by dependance and reliance upon party's prior stance, did district and appellate courts fail to note dentist had not shown grounds for estoppel, in plaintiff woman's 1976 contradiction of 1974 law clerk pleading an unproven, inconclusive allegation as defense law required.?

8. Did error exist in district when a summary judgment was retained, despite clear factual issue of mind state for plaintiff in her clear affidavit facts and mind state of 1974 discovery of harm, conflicting with inconclusive 1974 law clerk allegation as a defense law asked?

9. Did the evidence of record entitle woman plaintiff-appellant to a jury trial, and means to discovery to enlarge the record, and allow case on the merits, with law clerk's 1974 unproven allegation as evidentiary, inconclusive, as Arizona and federal procedures largely hold?

STATEMENT

1. Proceedings in the Trial Court

Plaintiff Joan Taylor, propria persona, Beverly Hills, California, brought dental claim for malpractice, facial paralysis, batteries of cutting off lower jawbone, and fourteen (14) lower jaw teeth crowns by dentist placed in gross malocclusion, with breach of contract for twenty-eight (28) teeth crowns to be placed in centric occlusion after prior dental injury; and defendant witness in Kansas suit for prior dental injury. Suit filed February 6, 1976 was counterclaim to dentist's 1974 suit for partial bill of two thousand, two hundred and fifty ($2,250.00) dollars in contract for five thousand, five hundred ($5,500.00) dollars.

Suit was filed for one million, three hundred thousand ($1,300,000.00) dollars for facial paralysis and injury, under diversity of citiznry, within two-year Arizona Statute of limitations for tort, A.R.S. 12-542. Complaint bore no defect on face. December 29, 1976 affidavit of woman plaintiff stated first discovery of harm found February 8, 1974. Thus suit timely filed February 6, 1976. A prior pleading error fact in allegation required by law as defense, unproven, not litigated, and somewhat contradicted by same 1974 pleading became mere evidence, no longer binding on party, after affidavit contradiction by woman, to suggest woman knew dental injury on February 4, 1974 when she stopped a two thousand, two hundred and fifty ($2,250.00) dollar check after stating she did not have money in bank nor time to transfer funds in short time of dentist's sudden demand.



a. Dental contract and 1974 treatments

On January 21, 1974, dentist agreed to witness for plaintiff in her Kansas dental suit against dentist; restore plaintiff injured by Kansas dentist who ground down teeth and removed bone in batteries; place twenty-eight (28) teeth crowns in centric occlusion for five thousand, five hundred ($5,500.00) dollars; and inform of any need for plastic surgery to rebuild face bones.

Dentist did not complete work. He placed fourteen (14) of twenty-eight (28) teeth crowns in treatments January 22, 26; and February 2 and 9, 1974, with gross injury, malocclusion, fraudulent concealment and a cause of severed facial nerves and face paralysis, and much bone cut out in battery.

On February 8, 1974, six (6) days after placement by dentist, five (5) of fourteen (14) dental crowns fell out, breaking teeth root and disclosing heavy weight. On the next day, in treatment, dentist fraudulently concealed injury and treated plaintiff, in fraud.

b. Dentist demand for sudden partial pay

Plaintiff paid five hundred ($500.00) dollars before work, of her own wish. No time was set to pay five thousand, five hundred ($5,500.00) contract.

February 2, 1974, after woman had heavy anaesthesia, and fourteen (14) dental crowns placed, dentist asked two thousand, two hundred and fifty ($2,250.00) dollars for partial bill payment. Woman protested dentist's sudden demand, told her telephone costs, to inform renter and bank long-distance and the renter costs, to sell grain quickly,

in Kansas, two hundred miles from woman's Missouri residence. Woman asked time to evaluate dental crowns, transfer funds by mail, after selling Kansas grain from her farm, and asked to have contract completed by dentist before any pay to him. Dentist refused. Woman final wrote check for two thous[illegible] two hundred and fifty ($2,250.00) dollars for partial payment, Saturday afternoon, February 2, 1974.

Some thirty (30) hours later, after a 36-hour bus ride from Arizona to Missouri, angered woman telephoned her bank to stop check payment. Woman was fatigued by trip, bus travel; angered at dentist's sudden demand without completed contract.

On February 8, 1974, woman returned to Arizona for more dental crowns. Then, five (5) of fourteen (14) crowns placed six (6) days prior, fell out, breaking tooth root and disclosing heavy weight. Woman discovered then, for first time, some dental injury. but did not know full extent. She went to dentist February 9, 1974, as scheduled, for fourteen (14) more crowns, these on upper jaw. Dentist asked her for money, to cancel her check stop; and dentist fraudulently did not inform injury, and treated in fraud. No dentist could replace crowns which had broken out teeth root. A few months later, eleven (11) of the fourteen (14) crowns had fallen out.

c. Dentist sues for partial bill

February 23, 1974, dentist filed suit for two thousand, two hundred and fifty ($2,250.00) dollars, partial bill; and five thousand ($5,000.00) punitive damages.

Plaintiff, Kansas City, Missouri resident, found two lawyers failed to answer and motion



for continuance, despite law firm "standing." Dentist took default, April 8, 1974; and secured July 1974 judgment on default, with no notice to woman. Dentist was granted his partial bill of two thousand, two hundred and fifty ($2,250.00) dollars and denied his five thousand ($5,000.00) dollars in punitive damage.

May 1974, plaintiff moved to California, went weekly to Arizona for lawyer. In pain, injury; woman found lawyers refused as dental awards low; lawyers did not know anatomy and occlusion; suit hampered by Kansas and Arizona dental injury apportioned, and prior attorney errors.

September 1974, a Phoenix law clerk in medical defense firm accepted her suit, as motion to set aside default for partial dental bill. The 1974 pleading by law clerk and the 1976 affidavit of plaintiff to contradict the 1974 pleading error in defense required by law form basis for later 1976 Arizona district and Ninth Circuit order to dismiss, and grant summary judgment.

September 1974, plaintiff oath did not include law clerk pleading error; nor did woman see any pleading written by law clerk. In oral hearing on her default of partial dental bill, the gravely-ill county judge Thurston who took medical discharge a few months later did not set aside her default. The judge opined "She took too long to get a lawyer.." when lawyer's many refusals were basis of woman's pleadings and pleas.

September 1974, the judge in hearing on default for dental bill, did not allow any comment on quality of dental work as this was not within jurisdiction for default.

—

The instant suit 1976, after complaint filed followed this course: dentist answered March 3 1976. He sent interrogatories, answered by woman plaintiff April 1976.

On April 20, 1976, dentist filed motion for summary judgment. Motion alleged all elements for fraud were not satisfied; res judicata existed for all, by motion to set aside default of dental bill; and a question of seventy (70) hours might bar by limitations, by unproven allegation as defense required by law, in 1974 law clerk pleading for woman, to suggest, then somewhat contradict, woman knew dental injury when she stopped a two housand, two hundred and fifty ($2,250.00) dollar check, several hours after signing it.

On May 23, 1976, dentist was granted summary judgment by default of woman. Woman did not receive motion or court letter. Woman had moved reidence; some mail was not delivered. Defective service resulted. Court and attorney had mail returned to them.

On June 17, 1976, woman informed court of defective service for her, despite mail forwarding arranged by postal employee and former manager of apartment. On June 19, 1976, attorney for woman also informed court of defective service of motion.

In May and June, 1976, woman, beset and maimed by criminal abuses of radiation and electronic crime, paid two (2) lawyers to prosecute instant suit and stop crime to her linked to dental suits by investigators. Woman paid almost three thousand ($3,000.00) but lawyers failed to act.

In July, 1976, woman arranged hearing for her motion to vacate summary judgment by default. Clerk office gave October date, then December date by plaintiff illness.



The woman's motion to vacate denied any fraud element remained; denied any issue of negligence res judicata in any motion to set aside default of dental bill, as no answer to complaint issued until the 1976 counterclaim; listed many issues of injury to prevent summary judgment; gave facts of defective mail service April 1976 to allow default lifted; and denied any bar to limitations existed by unproven allegation of law clerk pleading 1974, asking deposition and interrogatories explore this. The woman's motion, in her illness and legal untutored ignorance, despite academic doctoral and one year of law study, has many lacks.

The woman's head x-rays by world-known orthodontists as exhibits proved merit of claim, by displaced mandible, classic open-bite deformity of butchered jawbones, and lower teeth crowns, half of them missing, in gross malocclusion, deformity.

The woman amended her motion to include nine (9) pages of facts, events and mind state of the plaintiff in 1974, and this brought clear factual issue to prevent any summary judgment retained for dentist.

On February 7, 1977, district court hearing for woman's motion to vacate the summary judgment, respected Phoenix lawyer Peter Guererro came with her and told the court:

> "..Rule 60(b) specifically authorizes the court to set aside a judgment ..for excusable neglect..immediately (woman) sought California attorneys' help for judgment..paid almost $3,000.00..and personal problems..and could not get attorney to help.."

Attorney Guererro stated:

> "..Rule 60 clearly authorizes the Court to set aside the judgment...I don't think believe our rules of procedure should be unfairly taken advantage of, and I'm not saying the Court or Mr. MacBan did that.. cases should be decided on their merits..."

On February 7, 1977, the District Arizona court in that oral hearing denied the woman's motion to vacate the judgment by default.

On February 7, 1977, the judge had before him, in pleadings, thw woman's clear affidavit words to contradict and loosen binding effect of 1974 pleading allegation of law clerk, as unproven, not-litigated, not-within-his-jurisdicn pleading error of fact on which Arizona District judge based his order, in error, to send instant suit to appeal.

In September 1974, law clerk submitted hurried pleading to set aside default for dental bill, with these words for woman; unseen by her; unknown to her:

> "..(Woman) ..cancelled said check (date of Monday morning February 4, 1974 not in pleading) to dentist..basing her actions on a belief the work was not substantially complete and not commonsurate with standards.."

and:

> "..meritorious defense..exists..as dentist failed to substantially complete the dental-medical work agreed upon and/or in alternative failed to complete said.. work in manner commensurate with .. standards..."



In instant suit 1976, dentist claims this unproven allegation, not in jurisdiction of default on dental bill, never material nor litigated, has binding force to deny plaintiff her rightful claim as 50-70 hour question of limitations bar from February 4, 1974, to suit filed February 6, 1976, a few hours past two years later.

In December 29, 1976 affidavit by woman plaintiff, woman contradicts 1974 pleading of fact error, allegation required by law as meritorious defense in dentist suit for bill, a check. Contradiction by party dispels binding force of non-material attorney pleading allegation, defense required by law.

In 1976 affidavit, woman brings factual issue of plaintiff mind state in events of February 1974. Factual issue of mind state makes error any district summary judgment. Woman's affidavit states:

> "5. That I did not know harmful quality of 14 lower jaw teeth crowns or jaw fractures of February 2, 1974 when I stopped check February 4, 1974 Monday morning.
>
> "6. That I discovered harm February 8, 1974 when the five (5) -tooth bridge fell out, breaking part of tooth root, and of heavy weight to frighten me.
>
> Affidavit signed: Joan Taylor"
> December 29, 1976

A reasonable man understnds inference of this discovery of first harm by plaintiff, a jury issue and for trial court. Plaintiff credibility in 1976-7 was never issue, yet judges have weighed this evidence and speculated on it, with inferences not permitted by rules of federal civil procedure.

On February 7, 1977, despite this clear issue of fact and contradiction to dispel binding force of prior unproven allegation by law clerk when mind state of plaintiff at issue now, a summary judgment was allowed, granted to dentist when motion to to vacate that judgment by default was denied to woman, a final order, and appealable.

Plaintiff filed timely notice of appeal on the twenty-eighth day (28th), for the Ninth Circuit Court of Appeals.

2. Proceedings in Ninth Circuit Court of Appeals

On March 7, 1977, plaintiff-appellant filed timely appeal 28 days after final order of district February 7, 1977, This appealed all Arizona district orders to deny plaintiff motions to vacate summary judgment by default. Plaintiff paid all costs, asked entire record, to show propria persona effort, and issues to prevent summary judgment retained by district order.

In April 1977, dentist motioned to dismis appeal, as frivolous, and asked treble damages. Motion was denied.

In July 1977, dentist resubmitted his motion for dismissal of appeal, with treble damages, charging untimely appeal, and no jurisdiction. Dentist charged ill, injured woman beset by crime, maimed, facially-paralyzed as litigant scolded by court for needless error.

In August 1977, appellant, ill by radiation toxicities and broken jaws, facial paralysis, answered in poor pleading, citing Wigmore, on Evidence, basis of federal and Arizona suits to set aside non-material, unproven allegations after contradiction by party. Appellant pled facts, mind state of plaintiff.



Appellant pled facts, material in issue: plaintiff clear words of harm found February 8, 1976; and suit timely filed. Affidavit words (above) dispelled prior binding force of unproven allegation, not-litigated nor an issue, of attorney pleading 1974, with fact error in notice pleading, defense required by law. The facts reached to merit of claim, to require jury and trier of fact.

October 26, 1977, the Ninth Circuit granted to dentist his motion to dismiss appeal, with treble damages from facially-paralyzed victim, weighing and speculating on evidence, to examine for jurisdiction.

November 16, 1977, appellant petitioned rehearing, citing suit timely filed, appeal timely, motion appealed as final and appealable; claim of merit existed; affidavit of discovery February 8, 1974 contradicted prior pleading allegation to suggest February 4, 1974 knowledge of harm as defense law required, and not binding after contradiction. Federal and Arizona precedent and procedure clearly favor appellant. On December 14, 1977, appellant sent additional authorities, where mistake and discovery modes favored plaintiff by analogy.

December 16, 1977, Ninth Circuit denied rehearing. Appellant asked review of all points of law in issue, in second petition for rehearing for Ninth Circuit Court. On February 23, 1978, Ninth Circuit Court denied second petition for rehearing, as final order, and stated no more papers would be filed.

From these decisions and those of district and this Circuit Court of Appeals, Ninth Circuit, petitioner appeals, and asks this honorable Court to review, as decisions of Courts below conflict with other district and Circuit decisions.

REASON FOR GRANTING THE WRIT

1. This case merits review by this Court on certiorari, or a remand and reverse to district, to proceed in light of the Supreme Court, Ninth and Other Circuits and districts, and Arizona holdings of long-accepted practice in evidence and pleading that a fact litigated and essential to judgment binds in other suits, but a nonlitigated, nonproven fact or allegation has no binding force after contradiction. The Supreme Court has so ruled in Eagle Lion Studios, Inc. v. Loew's, Inc, C.A.N.Y., 248 F.2d 438, affirmed 79 S.Ct 213, 358 U.S.100, 3 L.Ed.147, as self-serving declaration, and subsequent, numerous suits. The Ninth Circuit held only litigated fact binding on cause of New York Life Ins. Co. v G Graham, 92 F.2d 377 (C.A.9th, 1937), relying on Freeman in Judgments, supra., and similar suits. Arizona, suit of Sholly v. Amman, 450 F.2d 77 (C.A.9th, 1971, did not hold binding direct words in excited error of accident and event. Although Arizona follows a same course to give binding force in litigated matter, as Adams v Bear, 87 Ariz 288, 350 P.2d 751 (1961, and makes no clear pronouncement on evidentiary problem, Arizona does not bind after contradictory evidence is on record, and no prior judgment or advantage given by prior stance. Arizona also requires, as in Knight v Rice, 83 Ariz 379, 321 P. 2d 1037 that a party relying on estoppel to prevent adversary change of position, must clearly show acts in reliance and injury from the change. All suits have subsequent holdings to show consistency.

The Petitioner is entitled to the same judicial courtesy and legal right, in here.



2. The Writ of Certiorari should be granted, to prevent clear miscarriage of justice, as both Ninth Circuit and district decisions, upon motion to dismiss in search for jurisdiction, and prior district order to deny jurisdiction, based upon inconclusive law clerk allegation of 1974 weighed and speculated on evidence, in clear contrad contradiction to federal rules of civil procedure inherent in 1977 Ninth Circuit rulings of Pepper & Tanner, Inc. v. Shamrock Broadcasting, Inc., 463 F.2d 1813, (October 1977) and Data Disc v Systems Tech., Assoc., Inc., 557 F.2d 1280 (1977)

The Petitioner is entitled to same legal right and judicial compunction. A jury and trier of fact may weigh the evidence as Petitioner stated, in appeal to Ninth Circuit.

3. The Writ of Certiorari should be granted, to protect the indivud right to jury trial and trial on the merits, not a judicial and attorney shuffle when life gravity of facial paralysis demands legal justice, as in certiorari granted in Schulz v Pennsylvania Railroad Co., 350 U.S. 523, 76 S.Ct 608 (1956)

The Petitioner is entitled, by paralysis, as injury for life extenguishment.

4. The Writ should be granted, as in Glenn v. Summers, 132 U.S.152, 10 S.Ct. 41, 33 L.Ed.301 that defenses required by law, as the 1974 law clerk pleading herein, are not binding; and may not harm an individual client and person right.

5. Petitioner is entitled to day in court; trial on merits; jury issues. Petitioner now has a 1 in 500 chance at justice, as probable grant of certiorari, or reversal to district .

DID FEDERAL RULES OF CIVIL PROCEDURE, AS FOR JUDGMENT 726, 731, 28 U.S.C.A. ALLOW NINTH CIRCUIT COURT OF APPEALS AND AN ARIZONA DISTRICT COURT TO GRANT DISMISSAL OF APPEAL AND SUMMARY JUDGMENT ON UNPROVEN AND NEVER-LITIGATED ALLEGATION AS DEFENSE REQUIRED BY LAW IN PLEADING 1974 CONTRADICTED BY PARTY IN 1976 AFFIDAVIT BEFORE THE COURTS?

Whwere a question of fact essential to a judgment is actually litigated and is determined by valid and final judgment, it is determined as conclusive between parties in a subsequent action on a different cause of action, but is not conclusive if a fact or allegation is not actually litigated and determined on the first action, as in Eagle Lion Studios, Inc., v. Loew's, Inc, C.A.N.Y., 248 F.2d 438, affirmed 79 S.Ct 213, 358 U.S.100, 3 L.Ed.147, as self-serving declaration as in 31A C.J.S., Evidence #2965, Apage 684. Estoppel extends only to questions "distinctly upon issue and directly determined", as in Emich Motors Corp. v General Motors Corp., 1951, 340 U.S. 558, 568, 569, 71 S.Ct.408,414, 95 L.Ed.534, and cases cited within Eagle Rock, supra.

Quoting from Restatement, Judgments # 68, 1942), one finds "a judgment on one cause of action is not conclusive in a subsequent action on a different cause of action as to questions of fact (or allegation) not actually litigated and determined in the first action." (Emphasis added.

In the instant suit, the 1974 pleading allegation by law clerk was not proven, not litigated, and not conclusive in any prior judgment in dentist suit for bill in default by federal civil procedure and Supreme Court decisions well known and followed, to hold such 1974 allegation as inconclusive, unproven, not binding after contradiction.

The Ninth Circuit held only litigated fact binding on s following cause of action, as in



in New York Life Ins. Co. v Graham, 92 F.2d 377 (C.A.9th, 1937, relying on Freeman on Judgments (5th Ed) 627, p.1323. The same essential holding by another Circuit is found in City of New Orleans, v Citizens' Bank of Louisiana, 167 U.S.371,396, 17 S.Ct.905, 913, 42 L.Ed.202, to show that decision in instant suit was in conflict with decisions of Ninth and other Circuits, and Supreme Court as allegation here in 1974 was never litigated,

In C.J.S., as 68-71 in Pleading, Immaterial Facts, do not bind a party by averment or admission of immaterial facts even though immaterial only at stage of pleadings when made, as in Collinsworth vCCity of Catlettsburg, 32 S.W.2d, 982, 236 Ky.194. Arizona and other states follow this general holding.

The Ninth Circuit held, in Arizona suit Sholly v Amman, 450 F.2d 77, (C.C.A.9th, 1971) that party should not be bound by his actual testimony on a peripheral fact question which does not affect liability when impartial contradictory evidence is in the record. In headnote 1, Sholly, supra, cites Arizona gives binding force to party's testimony when there is no contradictory evidence in record. Arizona, as in all but six States, has not made a clear pronouncement on this evidentiary problem. Arizona gives binding force when there is no contradictory evidence on record, as In re Estate & Guardianship of Parton, 7 Ariz.App 526, 441 P.2d 561 (1968) where issue litigated; A party is estoppel to contradict position he advocated in prior judicial proceeding, as Martin v Wood, 71 Ariz.457, 229 P.2d 710 (1951), or in prior pleadings, Adams v Bear, 87 Ariz 288, 350 P.2d 751 (1960). In suits above, position was essential in prior litigation, and in trial; this is not true of 1974 allegation of instant suit. In instant suit, as in Sholly, supra, even though this issue has not yet been decided by Arizona courts in in seventy years and

more of history, Ninth Circuit and Arizona courts generally do not give binding effect and force to lawyer pleading error and unproved allegations as defense required by law, never litigated, on peripheral area. All federal and state holdings of Evidence 265 (10,14) allow liberal party contradictio of prior non-litigated allegation as defense. Evidence is usually admitted. Facts are explored. Instant suit, as in Sholly, supra, relies upon rule that in accident or similar event, as ignorant litigant, defendant forced into suit is often unable to know legal jargon, as first events of lawyer's agency for woman herein, as 9 Wigmore, Evidence # 2594a (3d.Ed,1940); McCormick, Evidence # 243 (1954). Here, woman had no legal background, had never heard words as default, judgment and other terms. Instant suit has no other persons for objective witness for woman, by events, but circumstance, evidence of dental suit allegation woman knew she had no money in bank when she wrote a two thousand ($2,000.00) check invites inquiry into money transfers claimed by woman, by 1974 dentist's suit claims, for his bill. A $2,000.00 money demand for woman alone, minutes after a bank opens, is not a usual request. Circumstantial evidence as this assists the woman's facts of money transfer and anger figured in her check stopped February 4, 1974, not harm known.

Estoppel of immaterial, unlitigated, allegation as defense required by law can not be held to bar suit for woman herein. as Arizona distrinctly holds that party has first assumed position and obtained relief by position, and cannot assume contrary one, as in Mecham v City of Glendale, 15 Ariz. App.402, 489 P.2d 66 (1971), and other cases.



Notice pleading of State and federal courts also makes unproven allegations untenable. The instant suit took no position prior for advantage on the unproven allegation as a defense required by law. Woman gained no advantage; she lost default motion, 1974. and did not plead defense required by law, as the allegation had no jurisdiction in the suit for bill default. Also, a deliberate pose, and unequivocal testimony by person and no contradicting evidence are held essential to retain binding force of prior pleading and testimony, as in 31 C.J.S. Estoppel # 74, in 9 Western Res. Law Rev 398 (Summer, 1954).

Knight v Rice, decided by the Arizona Supreme Court, as 83 Ariz 379, 321 P.2d 1037 clearly holds, and all subsequent reliant suits that a party relying upon estoppel, as dentist in suit herein, must plead and show by burden of clear and satisfactory suit proof that all elements of estoppel are present: (1) acts inconsistent with claim afterward relied on; (2) action by adverse party on faith of such conduct a and (3) injury to adverse party resultant. yet dentist herein has not claimed his own acts and reliance, nor his injury, as in Knight, supra, and Nichols v Bekins, 408 P.2d 34, 2 Ariz.App.272.; Savage v Royal Properties, Inc., 417 P.2d 925, 4 Ariz. App. 116; Columbian Investment Company, Inc, v. Sundt Construction Co., 1 Ariz.App. 124. The Arizona Supreme Court held all elements must be present for estoppel, in Contreras, v Indusstrial Commission, 403 P.2d 535, 98 Ariz.221, to add substantive law stance for instant suit reliance of woman., claiming no estoppel herein.

In Arizona suits holding estoppel, much evidence existed, as in Otis Elevator Co. v Valley National Bank, 447 P.2d 879, 8 Ariz.

497 (1968), and asked similar questions, both elements lacking herein where paltry allegation 1974 as unproven defense law required is contradicted by overwhelming evidence, facts, mind state of woman in affidavit contradiction, in her motion, and in circumstantial money evidence of dental suit 1974 pleading by dentist.

Supreme Court, federal and Arizona suits overwhelm, by opposition, to stance herein of Ninth Circuit and Arizona district in dismissal and grant of summary judgment on unproven, unlitigated, minor allegation required by law as defense in 1974 law clerk pleading for woman. The pleading is mere evidence insufficient to bar suit when 1976 affidavit of woman plaintiff and her mind state 1974 shown thus clearly contradict prior pleading error, and when adversary dentist had no reliance or injury by 1974 defense, to hold it as estoppel.

DID NINTH CIRCUIT COURT OF APPEALS AND ARIZONA DISTRICT HAVE FUNCTION TO WEIGH EVIDENCE, PASS ON CREDIBILITY OR SPECULATE ON ULTIMATE FACT FINDINGS WHEN 1974 LAW CLERK PLEADING DEFENSE REQUIRED BY LAW WAS CONTRADICTED BY 1976 AFFIDAVIT FACTS OF MIND STATE FOR PLAINTIFF IN 1974 EVENTS HEREIN?

In numerous decisions, Circuit and district courts scrupulously refrain from weighing evidence, passing on credibility of witness when no question raised and do not speculate on ultimate fact findings in clear conflict, whether as prior admission or, as herein, unproven allegations as defense required by law 1974 in dentist suit for bill. Ninth Circuit Court of Appeals, in Petter & Tanner, Inc., v Shamrock Broadcasting, Inc., 463 F.2d. 1810 (October 1977) addresses decisvely to federal courts (766) and



is also exacting, to ask elements known. Herein, record is void of facts for any discovery of harm before February 8, 1974. An unproven allegation, as defense, is not conclusive by federal or Arizona holdings, of a non-material, never-litigated defense.

WAS IT FUNCTION OF NINTH CIRCUIT APPEALS COURT AND, BEFORE THAT, THE DISTRICT COURT FUNCTION TO FIND ALL FACTS WITH MATHEMATICAL CERTAINTY, UPON SUMMARY JUDGMENT AND WITH NO RECORD DEVELOPMENT?

In Schulz v Pennsylvania Railroad Co., 350 U.S. 523, 76 S.Ct 608 (1956) reversal of suit to require jury decision on conflict of circumstantial evidence came, as grant of certiorari to consider failure of district to let action for fireman death by drowning go to jury. Here, facial paralysis for woman is lifetime loss, to require jury trial on merit, and any conflict of prior law clerk defense allegation 1974, when contradicted by woman's clear affidavit of discovery of harm February 8, 1974 and further, a suit timely filed February 6, 1976 for grave injury to person, by severed facial nerves. Arizona and federal law clearly hold this suit deserves a jury trial by evidence herein, even with scant record. as in Rhodes v El Rancho, 4 Ariz.A App 183, 418 P.2d 613 (1966), in Bailey v Montgomery Ward & Co., 431 P.2d 113 and persuasive Arizona suits when reasonable inference can be drawn from evidence that reasonable minds may differ on inferences to be drawn therefrom, the case must be submitted to the jury. The federal suit, Matlock Inc. v Hupp Corp, 57 F.R.D. 151 (1972) hodls even a change in some operative facts of cause of action does not alter tolling effect of well pleaded complaint, and herein, the complaint has no defect

Federal Rules of Civil Procedure, rule 56(c), 28 &.S.C.A. and relying on Fortner Enterprise, v. U.S. Steel, et.al.,394 U.S.495,508,89S.Ct1252,22L.Ed49 for reversal of district summary judgment. The Ninth Circuit also held in Kung v Fom I Investment Corporation, 563 F.2d 1318 (1977) that an allegation which merely stated general legal conclusion necessary to preveil on merits can be ignored at both trial and appellate levels in examining sufficiency of complaint. A complaint relying on such allegation was dismissed; by parallel, a conclusion by defense could not be binding in instant suit, and when sufficient evidence of affidavit here and motion facts refuted prior 1974 allegation, neither district nor appeals court should have held for it. In other analogy, the Ninth Circuit in Data Disc v Systems Tch. Assoc Inc (1977) 557 F.2d 1280 held only prima facie show of jurisdictional facts sufficient to avoid district summary judgment; affidavits held to withstand truth of allegations in pleading contradicted by affidavit, and appellate ruling that the district judge will not "weigh" affidavits of summary judgment in disputed facts. Further, Glenn v Summers, 132 U.S.152, 10 S.Ct 41, 33 L.Ed.301 heads many distinguished opinions holding that defenses required by law, as suit herein, by 1974 law clerk pleading, are not binding, and may not be used to prove a general issue.

The Supreme Court ruled in Exnicious v. United States, 563 F.2d 418 (1977) that tort claim to accrue, an issue of question of claimant's discovery of all essential elements of negligence, as damages, duty, breach and causation, all of which are lacking in any February 4, 1974 check stop by plaintiff herein. Arizona A.R.S. 12-542 time of discovery for tort, as two



upon its face, to bar the suit. Federal procedure allows change, even in suits where the other defenses herein are not available. A several hour question of time, in defense required by law as unproven allegation is not sufficient to defeat or bar a suit in Arizona and in federal court.

WAS IT FUNCTION OF NINTH CIRCUIT COURT OF APPEALS IN EXAMINING FOR JURISDICTION, AND FOR DISTRICT IN ISSUE OF MATERIAL FACT FOR SUMMARY JUDGMENT, TO DENY THE PLAINTIFF WOMAN A CONSTITUTIONAL RIGHT TO "trial by jury", TO PRESERVE FUNDAMENTAL RIGHTS?

A jury can not find each fact with a mathematical certainty, as well known, Exonicious, supra, but the fundamental right of each person to ask a jury trial on issues of material fact for merit of the suit claim is inherent right of this plaintiff, and held as in Galloway v. United States, 319 U.S.372, 320 U.Ed. 214, 63 S.Ct 1443, 87 L.Ed., on writ of certiorari from Ninth Circuit Court of Appeals, based upon the U.S.C.A. Const. Amend.7. on questions of sufficiency of evidence to submit to the jury. Suit notes the lack of uniformity for evidence sufficient for a jury; yet allows in all suits cited here, and thus included, that the constitutional guaranty of "trial by jury" requires a jury allowed to make reasonable inferences from facts proven in evidence. Even on scant, virtually no record allowed by district in this suit, a jury can reasonably infer a discovery of harm might first come, as for plaintiff and petitioner herein, from the falling out of teeth crowns, a few days after placement by dentist, as permanent. That

initial discovery of harm could be inferred, to expand to know permanent, not transitory physical injury, by incident. The 1975 affidavit by woman herein is clear evidence of her first discovery of harm February 8, 1978. Suit is timely filed February 6, 1976.

Attorneys in agency for client often err, and law attributes to client, but admissions, or, herein, allegation unproved and even contradicted by law clerk who wrote it 1974 may be evidence to refute, as Laird v Air Carriers, C.C.A. 5th, 1959, 263 F.2d 954. Arizona attorney errors, by unproven defense law required, may not defeat a jurty right to trial on merits and issues, Gravity of suit evident by woman's loss of one hundred thousand ($100,000.00) salary by dental malpractices and her expressionless face when employment in urban university and library administration demands social amenity of expression and tact. A need for justice is inherent; and Arizona and federal stance favor plantiff as petitioner.

Decisions of district and Circuit are in conflict with Arizona, federal and a deep fundamental Constitutional right of person to jury trial on merits, with 1974 pleading error and allegation by law clerk as mere evidence not binding after affidavit by woman contradicted it in 1976 record before the district and Ninth Circuit.

Petitioner requests this Honorable Court to grant certirorari for a propria persona, of limited legal study of one year, Petitioner asks reversal and remand to district, directed to develop record, and allow, consisten with Arizona, federal holdings and law and procedural rules and



A Constitutional right of plaintiff to a jury trial upon the issues and merits of her suit, with evidence of 1974 law clerk pleading error inconclusive, never proven, and not binding after 1976 affidavit by the party statement of clear mind state in 1974 discovery of harm February 8, 1974. This suit is timely filed February 6, 1976. District and Ninth Circuit Court of Appeals decisions are in conflict with Arizona, and district and federal suits, and with the Constitutional Ammendment 7 right of woman to a jury trial for her expressionless life, by dental malpractices.

For these reasons, a writ of certiorari should issue to review the Ninth Circuit Court of Appeals motion to dismiss dental claim of facial paralysis for victim, as a frivolous cause, with woman to pay dentist treble damages of money for malpractices.

Respectfully submitted,

Joan Taylor,
Petitioner, propria persona
124 South Rossmore
Los Angeles, CA 90004

EXHIBIT "A"

Law clerk pleading allegation 1974 without proof, and of no affect on the judgment, mrely an affirmative defense

Law clerk told plaintiff "The judge doesn't want to hear all that" -of her anger at dentist and lawyer for poor planning, her three trips ($600.00) to Phoenix from Missouri with work half done & dentist's sudden demand Saturday noon for $2,250.00 by Monday at 9:00 A.M.

When she had paid $500,00 of her own wish before his work.

Note: The following pages are precisely as submitted to the Court in sequence and in numbering.

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF MARICOPA

| | |
|---|---|
| RAYMOND J. PERGEAU, Plaintiff, vs. JOAN TAYLOR, Defendant. | No. C 288312<br>MOTION TO SET ASIDE ENTRY OF DEFAULT AND DEFAULT JUDGMENT<br>(Oral Argument Requested)<br>(Judge Thurston - Div. 8) |

Defendant, JOAN TAYLOR, by and through her undersigned attorneys, moves the Court pursuant to Rules 55(c) and 60(c), Arizona Rules of Civil Procedure, Vol. 16, Arizona Revised Statute, to set aside an entry of default and default judgment on the grounds and for the reasons as set forth in the attached memorandum of points and authorities, incorporated herein by this reference.

RESPECTFULLY SUBMITTED this 23rd day of August, 1974.

JOHNSON, TUCKER, JESSEN & DAKE

By William R. Mettles Jr.
William R. Mettles, Jr.
Attorneys for Defendant
29 Luhrs Arcade
Phoenix, Arizona 85003

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On or about January 21, 1974, plaintiff, RAYMOND J. PERGEAU orally contracted with defendant, JOAN TAYLOR, to perform certain dental - medical legal work in consideration for the sum of Two Thousand Seven Hundred Fifty ($2,750.00) Dollars. Defendant, JOAN TAYLOR, tendered to plaintiff a check in the amount of Two Thousand Two Hundred Fifty ($2,250.00) Dollars on or about February 2, 1974 in partial payment for said dental - medical work. Defendant JOAN TAYLOR believed said dental - medical work had been substantially completed with professional care commensurate with

29 LUHRS ARCADE
PHOENIX, ARIZONA 85003
TELEPHONE (602) 254-7201

community standards.

Subsequently, defendant canceled said check in the amount of Two Thousand Two Hundred Fifty ($2,250.00) Dollars previously tendered. Miss Taylor based these actions upon a belief that said dental - medical work undertaken by plaintiff, Dr. Pergeau, was not substantially completed and was not commensurate with community levels of professional care.

On February 21, 1974, plaintiff, RAYMOND PERGEAU, by and through his attorney, WILLIAM C. LOFTUS, filed a complaint in Superior Court, Maricopa County, for breach of contract. Defendant, JOAN TAYLOR, became aware of this action in Kansas City, Missouri. Immediately subsequent to receiving notice, defendant, through an attorney in Wichita, Kansas, attempted to answer said complaint with an extension of time by contacting plaintiff's attorney. Further, defendant, JOAN TAYLOR, contacted an attorney in Phoenix, Maricopa County, attorney JAMES SYMES, JR., who was unable to contact plaintiff's attorney. Defendant made all reasonable efforts to obtain legal assistance and file an answer within the legal time limit.

On April 4, 1974, plaintiff's attorney LOFTUS on behalf of his client filed an affidavit of default and entry of default in Superior Court.

On July 15, 1974, an entry of default judgment was entered by Commissioner Carson granting all prayers requested by plaintiff's attorney.

On August 20, 1974, the undersigned became aware of the default and entry of judgment, and immediately responded with this motion.

LAW:

Rule 55(c), Arizona Rules of Civil Procedure, Vol. 16, Arizona Revised Statutes states:



PROFESSIONAL ASSOCIATION
2 BILLING ARCADE
PHOENIX, ARIZONA 85003
Telephone (602) 264-7201

carely completely explainable, and the fact that said mistake is unexplainable has not precluded such mistake from being considered as such as will authorize relief from judgment. Martin v. Rossi, 18 Ariz. App. 212, 501 P.2d 53 (1972). Further, Arizona Courts have determined mistake, inadvertence or surprise as being defined by the reasonable man standard. C. Meisel Music Company v. Perl, 3 Ariz. App. 479, 415 P.2d 575 (1966); Bateman v. McDonald, 94 Ariz. 327, 385 P.2d 208 (1963).

Defendant submits that a meritorious defense to this matter exists as plaintiff, RAYMOND J. PERGEAU failed to substantially complete the dental - medical work agreed upon and/or in the alternative failed to complete said dental - medical work in a manner commensurate with community standards of professional care. Consequently, defendant submits plaintiff breached said contract or agreement, requiring defendant to pay no monies.

Further, defendant feels service upon her out of the jurisdiction of this Court was improper and consequently a basis of setting aside plaintiff's application for judgment and entry of default judgment.

Moreover, plaintiff feels all reasonable efforts were made in order to secure competent legal advice and adequate representation in this matter, short of actually traveling to Arizona, which at that time was financially impossible. Only upon traveling to Arizona and securing local representation, has defendant, JOAN TAYLOR, been able to adequately take part in this litigation.

Further, a prompt application for relief was filed as soon as notice was received by the undersigned, and defendant submits it would be improper to bar this motion on the grounds of laches.



CONCLUSION:

Defendant submits to the Court that the entry of default

EXHIBIT "B"

The true facts of events
February 1974, mind state
of appellant.

ALL REFUSED BY DISTRICT
AND APPELLATE COURT IN
BLATANT DISREGARD FOR
PLAINTIFF RIHHT TO JURY TRIAL
ON MERITS OF HER SUIT.

EXHIBIT "B"

Appellant's Affidavit
December 29, 1976

firmly states she first
found dental injury on
Friday, February 8, 1974
when 5 of 14 teeth crowns
fell out, 6 days after
dentist placed them

Appellant Motion details
events, facts, mind state
of plaintiff, thus factual
issues existed to preclude
district denial of motions
to vacate summary judgment
for dentist

# A F F I D A V I T

STATE OF CALIFORNIA

County of Los Angeles

JOAN TAYLOR, being first duly sworn upon her oath, deposes and says:

1. That at time of January to March 1974 acts of this action, I was resident of Kansas City, Missouri;

2. That I stopped payment February 4, 1974 on dentist Pergeau's $2,250 check by me, angered by dentist's abrupt demand for money Saturday, to be given him Monday morning, a $2,250 sum, when I saw no need for such hurry; when many dentists, for that money sum, would understand need to transfer funds; when extra phone calls, 70 miles drive and $60 expense for me and my farm renters could be incurred to meet dentist's unreasonable demand.

3. That I felt I should wear the 14 lower jaw dental crowns a few days before dentist asked his money from me.

4. That I stopped $2,250 check payment February 4, 1974, as I believed my $500 paid dentist before his work showed my good faith and ability to pay, without undue haste.

5. That I did not know harmful quality of 14 lower jaw teeth crowns or jaw fractures of February 2, 1974 when I stopped check February 4, Monday morning.

6. That I discovered harm February 8, 1974 when the 5-tooth bridge fell out, breaking part of a tooth root, and of heavy weight to frighten me.

Further your affiant sayeth not.

Joan Taylor
JOAN TAYLOR

SUBSCRIBED AND SWORN TO before me this 29th day of December, 1976.

My Commission Expires:
May 26, 1980

Nancene R. Lindley
Notary Public

OFFICIAL SEAL
NANCENE R. LINDLEY
NOTARY PUBLIC — CALIFORNIA
PRINCIPAL OFFICE IN
LOS ANGELES COUNTY
My Commission Expires May 26, 1980

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## FACTS

Plaintiff states facts for Review of Order December 20, 1976:

1. Plaintiff asks judicial recognition that plaintiff's propria persona pleading errors stem from lacks of expertise, with time limits, in documented criminal harassment to insuror gain in dental litigation.

2. Plaintiff asks to amplify her brief factual resumé of all matters of res judicata pleading of defendant's Motion for Summary Judgment, with note to limitations.

3. On February 2, 1974, a Saturday morning, dentist asked plaintiff to write $2,250 check to him, as plaintiff left office. Plaintiff did not expect to pay dentist until 14 crowns were later placed on her upper jaw, for another expected $2,750. Express contract called for 14 tooth crowns on lower jaw; then 14 tooth crowns on upper jaw; dentist witness of prior dentists' harm for plaintiff, in Kansas courts.

4. Plaintiff told dentist his demand for $2,250 check was unexpected; that she lacked $2,250 funds in checking account until she returned to Kansas, phoned or wrote her farm renters 200 miles distance from her, to ask them drive 20 miles to sell some milo, a grain commodity grown on plaintiff's farm, for the $2,250 check amount. Plaintiff told dentist that she would have $20 phone expense; her renters would have to drive 20 miles to sell grain, get papers of funds; then drive 70 miles to transfer grain funds from commodity sale to plaintiff's bank account in Kansas town away from her renters, unless 4 or 5 days for mailing allowed, to transfer monies. Plaintiff asked postdated check, or her mailed check from Kansas after funds transfer. Dentist demurred. Plaintiff said she would leave $2,250 check, if dentist would "wait a few days" to allow her transfer funds.

Dentist communicated agreement.

5. On February 24, 1974, dentist filed suit against plaintiff for $2,250 dental bill. (She had paid $500 before his work) Complaint stated that woman knew account insufficient for $2,250 check, as woman told dentist when he suddenly asked Saturday for $2,250 Monday morning. Plaintiff believed dentist had given his "business word," had agreed to "wait a few days" for funds transfer.

6. On February 4, 1974, plaintiff issued "Stop payment" order for $2,250 check so that her wealthy farm renters, of multi-million dollar farm interests, did not drive 80 miles, spend 3 hours, with plaintiff's $20 phone bills, so Phoenix dentist could get $2,250 he asked Saturday for Monday morning.

7. Plaintiff grew angry from February 2 to 4, 1974 as she believed dentist's sudden demand for money unreasonable haste. Plaintiff had paid dentist $500, before work, as good faith.

8. Plaintiff grew angry from February 2 to 4, 1974, at known Kansas lawyer who named dentist, as both men had failed written payment dates, terms, specifications for 14 lower jaw crowns and expected 14 upper jaw crowns, to provide convenience for her.

Plaintiff grew angry at dentist for same (above), and failure to show her expected 14 upper jaw crowns to "match" 14 lower jaw crowns she now wore February 2.

9. Plaintiff, from January 19 to February 4, 1974, had made 2 plane trips and 4 3-day bus trips traveling to Phoenix from Kansas City residence for dental work, after prior dentists' malpractices. Woman was tired, exhausted by travel; angered, frustrated by demands on her that dentist and lawyer could have avoided by plans, foresight, maturity, money agreements, samples. Anaesthesia was slow to wear off; all this reflected in plaintiff stop of $2,250 check. She felt vulnerable, "used."

10. Plaintiff strongly disliked dentist's demand for money Monday, when mailed transfer added only 3-5 days' time.



11. Plaintiff discovered malpractice February 8, 1974 when 5-tooth bridge of lower posterior (back) teeth fell out, breaking part of lower right 2d molar tooth root, 6 days after dentist placed bridge (as part of lower jaw 14 crowns). Plaintiff was shocked by bridge weight and construction, as she held it in hand, inspected it.

12. Plaintiff found malpractice February 9, 1974 in dentist's office Saturday morning as he x-rayed broken lower right 2d molar root when plaintiff asked x-ray. Dentist did not treat, nor cover exposed broken root; he deliberately pointed to a different tooth on other x-rays when she asked comparison to see harm. Dentist did not give appointment to replace or correct his 5-tooth bridge for her; he did not say bridge safe; he refused other questions. His lawyer Bill Loftus gave no help.

13. Plaintiff discovered more harm on, about February 12: dentist office phoned from Phoenix to Kansas City, asked: "Is Thad Nugent still your lawyer?" yet refused plaintiff request to replace 5-tooth bridge. This showed abandonment.

14. Dentist did not answer plaintiff letter February 14, 1974 to request care.

15. Plaintiff found increasing facial deterioration, upper lip pain, disfigurement and lower jaw pain, as time passed.

16. Plaintiff found 6th of 14 crowns fell out March 1974, as defective, harmful work.

17. Plaintiff believed, beginning March 1974, that dentist phoned her Kansas bank February 4, 1974 morning to ask $2,250, despite dentist's agreement February 2, 1974 to "wait a few days."

18. This is thrust intended by 1974 pleadings of Attorney Bill Mettler for Joan Taylor by attorney's undated references to cancelled check of plaintiff; by his deliberate use of word "actions" (plural, undated) to summarize plaintiff's anger after dentist demanded Saturday February 2 to be given $2,250 Monday

## AMENDMENT VII—CIVIL TRIALS

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law

### Historical Note

**Proposal and Ratification.** The first ten amendments to the Constitution were proposed to the Legislatures of the several States by the First Congress on September 25, 1789, and were ratified on December 15, 1791. For the States which ratified these amendments, and the dates of ratification, see notes preceding Amend. 1.

### Federal Rules of Civil Procedure

Jury trial of right, see Rule 38, 28 U.S.C.A.

PETITIONER, UNTUTORED IN LAW

WANTS A JURY TRIAL ON MERITS
OD DENTAL MALPRACTICE AND
FACIAL PARALYSIS FOR HER

NOT

JUDICIAL OPINION TO WEIGHT
THE EVIDENCE, SPECULATE,
AND DECIDE THE LAW CLERK
PLEADING IS "TRUTHFUL"
AND THE PLAINTIFF"S TRUE
AND FACTUAL DETAILING OF
MIND STATE FEBRUARY 1974
"has less probative value."

ORDERS

District

Order: May 23, 1976
Summary Judgment granted
to defendant dentist

December 20, 1976
Motion to Vacate Judgment
Denied to plaintiff

February 7, 1977
Motion to Vacate Judgement
Denied to Plaintiff

Circuit

Order: Defendant-appelle
dentist granted motion
to dismiss frivolous
claim

Petition for Rehearing
denied to appellant

Second Petition for
Rehearing denied to
appellant

United States District Court

FOR THE

District of Arizona

CIVIL ACTION FILE NO. [illegible]

JOAN TAYLOR,

Plaintiff,

vs.

RAYMOND PERGEAU, D.D.S.,

Defendant.

JUDGMENT

This action came on for ~~trial~~ hearing before the Court, Honorable Walter E. Craig, , United States District Judge, presiding, and the issues having been duly ~~tried~~ (heard) and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff take nothing and that the action is dismissed.

FILED

MAY 25 1976

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
BY [illegible]
DEPUTY CLERK

MAY 23, 1976 SUMMARY JUDGMENT FOR DENTIST BY DEFAULT OF PLAINTIFF

(Defective service; mail not forwarded after residence move)

Dated at Phoenix, Arizona, this 25th day May, 19 76.

W. J. FURSTENAU, Clerk

By [signature]
Deputy Clerk of Court

LODGED

DEC 2 - 1976

OFFICE OF THE CLERK
U. S. DISTRICT COURT
DISTRICT OF ARIZONA

FILED

JAN 6 - 1976

W. J. FURSTENAU, CLERK
UNITED STATES DISTRICT COURT
BY THE DISTRICT OF ARIZONA

Darcy A. Mazzeo
BURCH, CRACCHIOLO, LEVIE, CUNNINGHAM & GIST, P.C.
2333 NORTH CENTRAL AVENUE
PHOENIX, ARIZONA 85004
TELEPHONE (602) 252-7701

Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

JOAN TAYLOR,

Plaintiff,

vs.

RAYMOND PERGEAU, D.D.S.,

Defendant.

NO. CIV 76-93 PHX WEC

O R D E R

The motion of Plaintiff, JOAN TAYLOR, to vacate and/or reconsider summary judgment and for a rehearing, dated and signed November 16, 1976, came on duly before the Court for hearing on December 20, 1976.

The Court being fully advised in the premises,

IT IS HEREBY ORDERED, denying the motion of Plaintiff to vacate and/or reconsider summary judgment and for a rehearing.

DONE IN OPEN COURT this 20th day of December 1976.

[signature]

Unexecuted COPY of the foregoing mailed this 21st day of December 1976, to:

Joan Taylor
Gaylord Hotel 1006
3355 Wilshire Boulevard
Los Angeles, California 90010

ORDER DECEMBER 20, 1976

DENIES PLAINTIFF F.R.C.P. Rule 60(b) MOTION TO VACATE JUDGMENT

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CIVIL DOCKET CONTINUATION SHEET — CIV 76-93 PHX WEC

| PLAINTIFF | DEFENDANT | DOCKET NO 76-93 |
|---|---|---|
| Joan Taylor | Raymond Pergeau, D.D.S. | PAGE 2 OF ___ PAGES |

| DATE 1977 | NR. | PROCEEDINGS |
|---|---|---|
| Jan 31 | — | Minute Entry: ORDER pltf's Motion to Vacate etc. cont'd to Feb 7 1977 at 10 AM. |
| Feb 7 | — | Minute Entry: Hearing had on pltf's Motion to Vacate and/or to Reconsider Order December 20 1976 to Allow Amended Pleading by Pltf. Joan Taylor present, Peter Guerrero present for pltf for this motion only; Barry MacBan present for deft. ORDER motion denied. |
| Mar 7 | 16. | Pltf's Notice of Appeal from the order, orally given 2/7/77 and written Feb 14, 1977. |
| Mar 7 | - | Copy to: 9th CCA, Burch et al. |
| Mar 7 | 17. | Pltf's notice of change of address. |
| Mar 8 | - | Deposit in registry fund Pltf's cost bond in the amount of $250.00. |
| Mar 11 | -- | Minute Entry: Good cause appearing, it is ordered that the time in which to transmit the record on appeal is extended until March 22, 1977. (Copy to: 9th CCA |
| Mar 24 | 18 | Pltf's designation of record on appeal. Copy to: Crt Reporter, Burch, et al. |
| Apr 14 | -- | Minute Entry: Good cause appearing, it is ordered that the time in which to transmit the record on appeal for the purpose of allowing the Court Reporter for preparing transcripts is extended until May 16, 1977. |
| May 13 | 19. | Reporter's transcript of proceedings had on May 24, 1976, December 20, 1976 and February 7, 1977. (Original and one copy) |
| May 16 | - | Record on Appeal transmitted to 9th CCA |

ORDER FEBRUARY 7, 1977

DENIES PLAINTIFF HER MOTION TO VACATE
SUMMARY JUDGMENT FOR DENTIST
BY DEFAULT OF PLAINTIFF, AFTER
DEFECTIVE MAIL SERVICE FOR HER

appellant

# United States Court of Appeals
FOR THE NINTH CIRCUIT

JOAN TAYLOR,
Plaintiff-Appellant,

vs.

RAYMOND PERGEAU, D.D.S.
Defendant-Appellee.

77-1891
No.
DC#CV76-93 WEC

APPEAL from the United States District Court for the
District of ARIZONA

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of ARIZONA (PHOENIX)

and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the appeal ~~judgment of the District Court~~ in this Cause be, and hereby is Affirmed.

OCTOBER 26, 1977
Filed and entered

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

OCT 26 1977

EMIL E. MELFI, JR.
CLERK, U.S. COURT OF APPEALS

JOAN TAYLOR,

Plaintiff-Appellant

vs.

RAYMOND PERGEAU, D.D.S.

Defendant-Appellee

No. 77-1891

ORDER

Docketed
OCT 31 1977

Before: CHOY and WALLACE, Circuit Judges.

Upon due consideration, the Court issues the following order:

(a) appellant's answer to motion to dismiss, appellee's response to appellant's answer, and appellant's supplemental pleading are ordered filed;

(b) appellee's motion to dismiss is granted; and

(c) appellant's motion for extension of time to file opening brief is denied as moot.

United States Circuit Judges

MB Sal 10/17/77

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

DEC 16 1977

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

JOAN TAYLOR,

Plaintiff-Appellant,

vs.

RAYMOND PERGEAU, D.D.S.

Defendant-Appellee.

No. 77-1891

ORDER

DC# Cv 76-0093 WEC
Arizona (Phx)

Before: CHOY and WALLACE, Circuit Judges.

Upon due consideration:

1. Appellant's motion to extend time in which to file her petition for rehearing is granted, and the petition for rehearing and suggestion for rehearing en banc lodged with the Clerk on November 16, 1977 shall be filed by the Clerk.

2. Appellant's petition for rehearing is denied and her suggestion for rehearing en banc is rejected.

3. Appellant's motion for stay of issuance of mandate is denied as moot.

United States Circuit Judges

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

FEB 23 1978

EMIL E. MELFI, JR. CLERK
U. S. COURT OF APPEALS

JOAN TAYLOR,

Plaintiff-Appellant

vs.

RAYMOND PERGEAU, D.D.S.,

Defendant-Appellee

No. 77-1891
D.C.# CV 76-93
ARIZONA (Phoenix)

ORDER

Docketed
FEB 27 1978

Before: CHOY and WALLACE, Circuit Judges.

Upon due consideration, the Court issues the following order:

(a) appellant's motion for reconsideration of petition for rehearing is denied;

(b) appellant's motion to allow late filing of brief is denied; and

(c) the case is closed and the Clerk will not file any additional papers submitted in the appeal.

United States Circuit Judges

CERTIFICATE OF SERVICE

I hereby certify that on this 23 day of May, 1978, copies of the Petition for Writ of Certiorari were mailed, postage prepaid to the following:

Attorney Barry MacBan
233 North Central Avenue
Phoenix, Arizona 85003 (3 copies)

Circuit Judges Choy, and Wallace, c/o
Clerk, U.S. Court of Appeals for the
Ninth Circuit, U.S. Court of Appeals
Post Office Building
7th & Mission Streets
P.O. Box 547
San Fransico, CA 94101

Hon. Walter H. Craig, Judge of the
U.S. District Court, c/o Clerk
U.S. Courthouse and Federal Building
Phoenix, Arizona 85025

Joan Taylor, propria persona